



Legal Update

October 2017

The Appeals Court holds that the police surveillance, questioning of the juvenile and subsequent police pursuit of the juvenile did not constitute a seizure based on the facts of this case.

Commonwealth v. Shane S. a Juvenile, Mass. Appeals Ct. No. 15-P-1746 (2017):
On January 6, 2015, Boston police responded to a radio broadcast that Dion Ruiz, who was on conditional release for a pending criminal charge was in a global positioning system (GPS) exclusion zone area of Boston. Officer Eric Merner drove to the area to search for Ruiz. Officer Merner arrived near Washington and Ruggles Street where he noticed a juvenile standing on the corner. While watching the juvenile, Officer Merner saw Ruiz further down the street. The juvenile began lightly jogging towards Ruiz, with both of his hands held in front of his “belt buckle area” at his waist, with his elbows sticking out to the sides. The juvenile appeared as though he was jogging in an unnatural way. Officer Merner had specialized training on the characteristics of an armed person, which included walking or running with arms pinned down so as to hold onto a firearm. The juvenile met Ruiz and they walked along the street together.

Officer David Crabbe arrived on scene and said, **“Hey, guys, can I talk to you for a sec?”** Ruiz and the juvenile stopped walking and the juvenile fled. Officer Crabbe began running after the juvenile. Like Officer Merner, Officer Crabbe also had training in identifying the characteristic movements of someone who is armed with a firearm.

Officer Crabbe noticed that the juvenile had “his right arm being pinned up against his the right side of his body as he was running with his left hand swinging fully.” Believing the juvenile had a firearm, Officer Crabbe followed the juvenile. However, Officer Crabbe did not call out to the juvenile to stop, or indicate to the juvenile that he was following him. At one point, the juvenile, bent over at the waist next to the grills located near the side of a building, then straightened up and resumed running. After bending down near the grills, the juvenile ran for the first time with both arms swinging freely.

A short time later, Officers Crabbe and Merner encountered the juvenile walking at a normal pace, “as if trying to blend in.” The officers approached the juvenile and spoke with him. **Officer Crabbe placed his hand on the juvenile’s chest and felt his heart beating “very quickly,” and breathing heavily.** The police placed the juvenile in handcuffs and conducted a patfrisk of his person. Although they did not find any weapons on him, they retraced where the juvenile had bent down near the two grills and recovered a loaded firearm. The juvenile was charged and filed a motion to suppress. The motion was denied and the Appeals Court affirmed the ruling.

Conclusion: The Appeals Court held that the police had reasonable suspicion to stop and subsequently seize the defendant based on trained officers’ opinions that the juvenile was carrying a firearm due to the manner in which the juvenile was running with his arm by his sides. As part of its analysis, the Appeals Court first considered the moment in which the police seized the juvenile and lastly whether the seizure was justified.

1. Police surveillance and questioning of the juvenile:

The police surveillance and questioning of the juvenile did not constitute a seizure. Rather the police seized the juvenile when Officer Crabbe placed his hand on the juvenile’s chest after the juvenile stopped running. In cases involving street encounters between the police and civilians that result in the seizure of contraband such as firearms or drugs, determining the moment when the person was seized is often the critical question that the judge must decide. See *Commonwealth v. Barros*, 435 Mass. 171, 173(2001). Massachusetts law adheres to an objective standard whereby a person has been “seized” by a police officer “if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). “Whether, and when, a seizure has occurred ‘will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.’” See *Terry v. Ohio*, 392 U.S. 1, 13 (1968)

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Here the Appeals Court determined that the police conducting surveillance of the juvenile and asking if he could speak to him did not constitute a seizure because there was no indication that the juvenile was not free to leave. Police surveillance, consisting of observations of a person's movements in public places, is not a seizure and does not require any level of suspicion. *Commonwealth v. Williams*, 422 Mass. 111, 116 (1996). With regard to the police asking to speak with the juvenile, the Appeals Court again found that the questioning did not constitute a seizure. The Supreme Judicial Court and this court have often considered street encounters between the police and a civilian in which the police ask a question in an effort to identify the civilian or to gather information about a report of criminal activity in the area. "There is no seizure where police merely ask questions unless a reasonable person, given the circumstances of the encounter, would believe he was not free to walk away." *Commonwealth v. Franklin*, 456 Mass. 818, 820 (2010).

2. Police pursuit of the juvenile:

The Appeals Court also analyzed whether the police pursuit constituted a seizure. "The particular nature of the law enforcement action dictates whether a police 'pursuit' will be considered a seizure." *Commonwealth v. Sykes*, 449 Mass. 308, 312 (2007). According to the evidence in the record Officer Crabbe never called out for the juvenile to stop and there is no indication that the juvenile was aware that Officer Crabbe was chasing him. Officer Crabbe testified that when the juvenile ran past him, "I let him run for a little bit so I could observe." Officer Crabbe then explained that he began to run after the juvenile, observed the juvenile appear to hide something in the area where the police later discovered a firearm, and eventually, after losing sight of him several times, saw the juvenile walking from the corner of a building. There is also no evidence that the juvenile looked back at Officer Crabbe.

Massachusetts law provides that a seizure, in the constitutional sense, may occur before police officers, in pursuit of a suspect, physically detain the person. *Commonwealth v. Stoute*, 422 Mass. 782, 785-789 (1996). The test the courts apply is an objective one that is based on the perspective of the person being pursued. (i. e. subjective intent of the police officer is not considered) See *Commonwealth v. Pearson*, 90 Mass. App. Ct. 289, 292 (2016), (whether a reasonable person in the position of the person being pursued would have believed that he was not free to leave.) *United States v. Mendenhall*, 446 U.S. at 554.

Previously the court held in *Franklin* that, "flight alone does not create reasonable suspicion to justify a threshold inquiry, merely running after a running person, without

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more, does not effect a seizure in the constitutional sense.” *Commonwealth v. Perry*, 62 Mass. App. Ct. 500, 502 (2004). In *Franklin*, the court found that a seizure did not occur when the police left their cruiser and began to chase the defendant because the defendant’s flight “was not prompted by anything the police did and, indeed, began before the officers got out of their vehicle. There was no evidence that the police exercised any show of authority or commanded the defendant to stop.” *Id.* at 822-823.

Similar to *Franklin*, the judge in this case found that the officers were at the scene in order to arrest Ruiz for violating a pretrial condition of his release. When Officer Crabbe approached Ruiz and the juvenile, “it was specifically to stop Ruiz.” The question directed to the pair by Officer Crabbe did not signal to the juvenile that he was not free to leave. Additionally, the police pursuit was not accompanied by words or conduct that would communicate to a reasonable person in the position of the person walking, running, or otherwise leaving the scene that the police are making an effort to capture him. A reasonable person in those circumstances would not feel free to leave. After comparing the facts of this case to *Franklin*, the court determined that the police surveillance, subsequent questioning and pursuit of the juvenile did not constitute a seizure. Rather the seizure occurred when Officer Crabbe placed his hand on the juvenile’s chest.

3. Justification of the seizure:

The Appeals Court held that the seizure of the juvenile was justified because the police had reasonable suspicion to believe he was armed based on a number of factors. First, the Appeals Court credited the officer’s observations the juvenile running with his arms restricted by his side was significant based on the specialized training the officers had. The juvenile’s subsequent action of bending over a grill adjacent to building and change in his running with his arms swinging freely bolstered the officer’s contention that that the juvenile had been carrying a firearm. The officers’ suspicion that the odd way of jogging and running was a sign that the juvenile had a firearm was not a mere “hunch,” *Commonwealth v. Wren*, 391 Mass. 705, 707 (1984), but was the result of the application of their experience and training to their observations of the juvenile. These observations were sufficient to support an inference that the juvenile was carrying a firearm. See *Commonwealth v. Gunther G.*, 45 Mass. App. Ct. 116, 119 (1998) (because license to carry firearm only may be issued to persons twenty-one years of age or older, G. L. c. 140, § 131(d)(iv), apparent minor’s possession of firearm “may be viewed as presumptively illegal”).

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The Appeals Court also emphasized that the fact there were prior shootings in the area, that the juvenile and Ruiz knew each other and that Ruiz was in violation of GPS conditions on pending firearm charges all were included in the reasonable suspicion calculus. The combination of factors, taken together, amounted to sufficient reasonable suspicion necessary to justify Officer Crabbe's seizure of the juvenile. See *Williams*, 422 Mass. at 117. See also *Commonwealth v. Fraser*, 410 Mass. 541, 545 (1991) ("a combination of factors that are each innocent of themselves may, when taken together, amount to the requisite reasonable belief"). For the above reasons, the Appeals Court holds that the juvenile was not seized until the police put their hands on him after the foot chase. Accordingly, the police properly seized the loaded firearm discovered next to the grills.

Commentary: This is a great case that demonstrates how report writing and testimony are critical in firearms cases. Here the officers were able to articulate how the specialized training along with their observations signaled to them that the juvenile was likely carrying an illegal firearm. Additionally, Officer Crabbe's testimony about why he decided to run after the juvenile and observe him before approaching him adds a lot to credibility to his actions.

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